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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1197

EDWARD McGRATH,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
Introduction	2
Petitioner is called before a grand jury and challenges the basis for the inquiry	3
Petitioner returns to the grand jury, lies while under oath, and is indicted for criminal contempt	5
Petitioner unsuccessfully moves to suppress his grand jury testimony	7
Petitioner is convicted after trial	7
Petitioner is granted a new trial during his state court appeal	8
Point—The Court lacks jurisdiction to review this case because the judgment of the Court of Appeals is not "final" within the meaning of 28 U.S.C. §1257. In any event, the issue raised by petitioner does not warrant consideration by this Court	10
Conclusion	14

TABLE OF AUTHORITIES

PAGE

Cases:

Bryson v. United States, 396 U.S. 64 (1969) 13

Cox Broadcasting Company v. Cohn, 420 U.S. 469 (1975) 11

Dennis v. United States, 384 U.S. 855 (1966) 13

Gelbard v. United States, 408 U.S. 41 (1972) 5, 11, 12
Gold v. Menna, Matter of, 25 N.Y.2d 475, 307 N.Y.S.2d 33 (1969) 4

Kastigar v. United States, 406 U.S. 441 (1972) 4
Kay v. United States, 303 U.S. 1 (1938) 13

Market Street Railway Co. v. Railroad Commission of the State of California, 324 U.S. 548 (1945) 10
McGrath v. People of the State of New York, 258 So.2d 291 (Fla. Dist. Ct. App.), *cert. denied*, 263 So.2d 833 (Fla. 1972) 3

People v. McGrath, 46 N.Y.2d 12 (1978) 2, 9
People v. McGrath, 57 A.D.2d 405, 394 N.Y.S.2d 855 (1st Dept. 1977) 1, 8
People v. McGrath, 86 Misc.2d 249, 380 N.Y.S.2d 976 (Sup. Ct. N.Y. Co. 1976) 7
People v. Munger, 37 A.D.2d 950, 326 N.Y.S.2d 212 (1st Dept. 1971), *appeal dism'd*, 33 N.Y.2d 576, 347 N.Y.S.2d 449 (1973) 13
People v. Townes, 41 N.Y.2d 97, 390 N.Y.S.2d 893 (1976) 12
People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 189 N.Y.S.2d 898 (1959), *appeal dism'd*, 361 U.S. 534 (1960) 4
Persico, In re, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974) 5, 11

PAGE

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 10

United States v. Appel, 211 F. 495 (S.D.N.Y. 1913) ..... 6n.
United States v. Calandra, 414 U.S. 338 (1974) 5
United States v. Callahan, 439 F.2d 852 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971) 2
United States v. Ceccolini, 435 U.S. 268 (1978) 12
United States v. Kapp, 302 U.S. 214 (1937) 13
United States v. Knox, 396 U.S. 77 (1969) 13
United States v. Mandujano, 425 U.S. 564 (1976) 13
United States v. Morales, 566 F.2d 402 (2d Cir. 1977) 8
United States v. Perdiz, 256 F. Supp. 805 (S.D.N.Y. 1966) 12
United States v. Scios, 23 Crim. L. Rptr. 2424 (D.C. Cir. 1978) (en banc) ..... 13n.
United States v. Wong, 431 U.S. 174 (1977) 13

Wong Sun v. United States, 371 U.S. 471 (1963) 12

Other Authorities:

N.Y. Criminal Procedure Law §50.10 4
N.Y. Criminal Procedure Law §190.35 4
N.Y. Criminal Procedure Law §190.40 4
18 U.S.C. §2515 ..... 12n.
28 U.S.C. §1257 10
S. Rep. 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Adm. News 2112 (1968) ..... 12n.

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PRELIMINARY STATEMENT

On July 19, 1976, petitioner was convicted after a jury trial in the Supreme Court, New York County, of Criminal Contempt in the First Degree (N.Y. Penal Law §215.51). He was sentenced on September 20, 1976, to a nine-month prison term. On May 31, 1977, the Appellate Division of the New York Supreme Court reversed the judgment of conviction against petitioner and ordered that the indictment against him be dismissed (*People* v. *McGrath,* 57 A.D. 2d 405, 394 N.Y.S. 2d 885 [1st Dept. 1977]). Upon

further appeal by the People, the New York Court of Appeals on November 30, 1978, reversed that portion of the Appellate Division order that dismissed the indictment, but ordered that the case be remitted to the Supreme Court, New York County, for a new trial (*People* v. *McGrath*, 46 N.Y. 2d 12 [1978]). That trial has been postponed pending a decision from this Court on the instant petition. Petitioner has been at liberty since his indictment, and is presently on bail pending the outcome of the new trial.

STATEMENT OF THE CASE

Introduction

On December 21, 1964, one Thomas Callahan and several accomplices robbed a bank truck in Patterson, New Jersey, and escaped with more than $500,000. See *United States* v. *Callahan*, 439 F. 2d 852 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971). One of the co-conspirators, Charles Roberts, subsequently elected to cooperate with the federal authorities. Before Callahan could be brought to justice, two unsuccessful attempts were made on Roberts' life. On the first occasion Roberts was shot in the chest. Later, his automobile was blown up; Roberts lost a leg, and his right arm was crippled for life. See *United States* v. *Callahan*, *supra*, at 859-60.

In 1969 the New York County District Attorney investigated the activities of petitioner's friend Hugh Mulligan to determine, in part, whether Mulligan and others had entered into a conspiracy to assist Callahan by making a third attempt on Roberts' life. In the course of the investigation, the District Attorney's investigators obtained 13 judicial

orders authorizing the use of electronic surveillance against Mulligan and others. They learned that petitioner, who lived in Florida, intended to visit Mulligan in New York early in September, 1969 (Affidavit of September 3, 1969, in support of an eavesdropping warrant, at 5, 6). During petitioner's stay in New York, physical surveillance was conducted of his activities. Petitioner spent several hours alone with Mulligan in Mulligan's car (Affidavit of October 2, 1969, in support of an eavesdropping warrant, at 3).

No electronic surveillance was conducted of the conversation between petitioner and Mulligan. However, on September 11 and September 12, 1969, the District Attorney's investigators intercepted conversations between Mulligan and a confederate (*id.*, at 3). In those conversations Mulligan stated that he had talked with petitioner about a plan to murder Charles Roberts, and that petitioner had offered to "whack [Roberts] up" himself (*id.*, at 8).

Petitioner is called before a grand jury and challenges the basis for the inquiry.

Petitioner was thereafter subpoenaed by a New York County grand jury investigating the activities of Mulligan and his associates. Petitioner resisted the subpoena for an extended period of time (523).* See *McGrath* v. *People of the State of New York*, 258 So.2d 291 (Fla. Dist. Ct. App.), *cert. denied*, 263 So.2d 833 (Fla. 1972). Finally, on February 20, 1973, petitioner appeared before the Third New York County Grand Jury for the February 1973 Term.

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* Subsequent numerical references and references followed by "a" refer to pages in the record on appeal in the Appellate Division of the New York Supreme Court.

Under New York law a witness who testifies before a grand jury without executing a waiver of immunity automatically receives "transactional" immunity. *See* N.Y. C.P.L. §§50.10, 190.35, 190.40. That immunity bars any prosecution of the witness for any matter about which he has testified, whether or not such prosecution would be based on the testimony, and is thus broader than the immunity which the Constitution requires. *Compare Kastigar* v. *United States,* 406 U.S. 441, 453 (1972) *with Matter of Gold* v. *Menna,* 25 N.Y. 2d 475, 481, 307 N.Y.S. 2d 33, 37 (1969). However, a witness who refuses to answer questions in the grand jury does not receive immunity and may be prosecuted, for criminal contempt. Moreover, a witness who does answer, but lies to the grand jury, may be prosecuted either for perjury or for criminal contempt, depending on the nature of his false answers. N.Y. C.P.L. §50.10. See, *e.g., People ex rel. Valenti* v. *McCloskey,* 6 N.Y.2d 390, 189 N.Y.S.2d 898 (1959), *appeal dism'd,* 361 U.S. 534 (1960).

When petitioner appeared before the grand jury, he was told by an Assistant District Attorney that the grand jury was investigating whether certain persons had conspired in New York County to commit the crimes of murder and assault. Petitioner was instructed that he would receive transactional immunity in return for his testimony. The Assistant District Attorney also explained that the grant of immunity meant petitioner's testimony could expose him to criminal liability only if he committed perjury or criminal contempt (4, 6-9).

Petitioner then inquired whether he would be asked any questions based on information derived from electronic surveillance (11). The Assistant District Attorney replied affirmatively (13), and petitioner and his attorney were taken immediately to a judge of the New York County Supreme Court. Petitioner contended that he was entitled to a full hearing on the legality of the electronic surveillance from which questions were to be derived (16a-17a). The judge ruled, however, that petitioner was entitled only to have the court examine the judicial orders authorizing the electronic surveillance (23a). The judge then examined the orders which had authorized electronic surveillance against Mulligan and found that each order "appear[ed] on its face to be valid" (24a). Petitioner was directed to return to the grand jury and answer legal and proper questions (25a-26a). The propriety of that direction is not challenged here. When petitioner was granted the hearing limited to a determination of the facial validity of the court orders, he received precisely that to which he was entitled by New York and federal law. As he apparently concedes now, he was not entitled to a full-scale suppression hearing before answering. Petition at 5-6. See *Gelbard* v. *United States,* 408 U.S. 41, 70 (White, J., concurring) (1972); *In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974). See also *United States* v. *Calandra,* 414 U.S. 338, 349-50 (1974).

Petitioner returns to the grand jury, lies while under oath, and is indicted for criminal contempt.

On February 22, 1973, petitioner again appeared before the grand jury, and again was told that he had been accorded transactional immunity (19-22). Petitioner was questioned about his relationships with Hugh Mulligan and

with Callahan, the subject of the federal robbery prosecution. Petitioner testified that he and Mulligan met in 1955 (45-47). Mulligan introduced petitioner to Callahan in 1969, and Callahan visited petitioner in Florida on two or three subsequent occasions (42-43, 54). Petitioner visited Mulligan in New York City in September 1969, and spent a substantial amount of time in Mulligan's car during that visit (55-58, 67).

The Assistant District Attorney then asked whether petitioner and Mulligan had on that occasion discussed Callahan's robbery prosecution and a plot to murder the witness, Charles Roberts. Although petitioner recalled, in minute detail, the other events of his visit to New York, he repeatedly maintained that he could not remember whether he and Mulligan discussed killing Charles Roberts (59-64). He persisted in so testifying even after he was warned that under New York law [as under federal law*] a witness who attempts to impede a grand jury investigation with patent lies about a failure of memory can, like the witness who refuses to give testimony at all, be prosecuted for criminal contempt (64-65, 68-70).

On May 4, 1973, the grand jury indicted petitioner for Criminal Contempt in the First Degree, for giving patently false answers when asked whether Mulligan told him that Callahan planned to kill Charles Roberts. N.Y. Co. Indictment No. 2416/73.

* See, *e.g.*, *United States* v. *Appel*, 211 F. 495 (S.D.N.Y. 1913).

Petitioner unsuccessfully moves to suppress his grand jury testimony.

Petitioner first presented the question he raises in this Court in a suppression motion brought before trial. Petitioner moved to exclude from evidence the questions and answers that underlay the criminal contempt indictment, arguing that the questions were the product of illegal eavesdropping.

Justice Burton Roberts, who heard the motion, found there was "little doubt" of the good faith of the District Attorney's investigators. He also found, however, that the first of the 13 orders authorizing eavesdropping on Mulligan had been based on an inadequate demonstration of probable cause, and that all subsequent orders were invalid as the fruit of the original invalid surveillance (*People* v. *McGrath*, 86 Misc. 2d 249, 251-52, 380 N.Y.S. 2d 976, 980 [Sup. Ct. N.Y. Co. 1976]). Justice Roberts nevertheless ruled that petitioner's grand jury testimony was admissible. He agreed with the People that petitioner's decision to lie was independent criminal conduct that dissipated the taint of any illegal eavesdropping (*People* v. *McGrath*, *supra*, 86 Misc.2d at 257, 380 N.Y.S. 2d at 985).

Petitioner is convicted after trial.

Under state law the proof of the criminal contempt in a case like petitioner's is limited to proof of the questions and answers before the grand jury. Accordingly, at trial the People introduced the minutes of petitioner's testimony before the grand jury. Petitioner's motion to redact certain portions, as too prejudicial, was denied. The defense presented no evidence.

On July 19, 1976, petitioner was found guilty by the jury of Criminal Contempt in the First Degree.

Petitioner is granted a new trial during his state court appeal.

The Appellate Division reversed petitioner's conviction and ordered that the indictment be dismissed. *People* v. *McGrath,* 57 A.D.2d 405, 394 N.Y.S.2d 885 (1st Dept. 1977). The court agreed with petitioner that taint from illegal eavesdropping is not attenuated by a witness' decision to give false answers, and concluded that petitioner's testimony before the grand jury should have been suppressed. The court also noted that a reversal of the conviction and a new trial would in any event have been necessary because some of the questions and answers (concerning petitioner's contact with racketeers) should have been redacted.

On appeal to the Court of Appeals, the People first argued that under the relevant New York and federal statutes, a grand jury witness who has been permitted to challenge the facial validity of eavesdropping orders during grand jury proceedings has no further suppression remedy. If after his challenge is heard he disobeys an order to respond truthfully to questions, and as a result is charged with a testimonial crime, he may not move to suppress his testimony. This is the rule which has been adopted by the Second Circuit. *United States* v. *Morales,* 566 F.2d 402 (2d Cir. 1977). Second, the People argued that even if petitioner was entitled to make a motion to suppress, the motion was properly denied because, instead of refusing to answer, he made an independent voluntary choice to lie.

The Court of Appeals reversed the order of the Appellate Division. The Court rejected the People's first argument and held, contrary to the rule in *Morales,* that petitioner could move to suppress his grand jury testimony. However, the Court agreed with the People that the illegality of eavesdropping could provide a defense only to a witness charged with refusing to testify. The witness who has lied to the grand jury, and who as a result is charged with criminal contempt or perjury, may not raise as a defense the illegal wiretap. By his own voluntary and independent criminal action before the grand jury, such a witness has dissipated the taint of illegal police conduct. *People* v. *McGrath,* 46 N.Y. 2d 12, 29 (1978).

The Court of Appeals also held, however, that the Appellate Division had correctly determined that the whole of petitioner's grand jury testimony, including testimony about prejudicial matters, should not have been placed in evidence at his trial. Thus, while the Court reversed the order of the Appellate Division suppressing petitioner's grand jury testimony, the Court nevertheless remitted petitioner's case for a new trial in the Supreme Court, New York County.

Petitioner's new trial on the indictment has been postponed pending a decision from this Court on the instant petition.

POINT

The Court lacks jurisdiction to review this case because the judgment of the Court of Appeals is not "final" within the meaning of 28 U.S.C. §1257. In any event, the issue raised by petitioner does not warrant consideration by this Court.

1. Under 28 U.S.C. §1257, this Court has jurisdiction to review the decision of the Court of Appeals only if that decision is "final"—that is, only if it marks an effective end to the entire litigation and not merely to an intermediate or interlocutory stage of the litigation. *Market Street Railway Company* v. *Railroad Commission of the State of California,* 324 U.S. 548, 551 (1945). The finality rule, in force since 1789, serves to protect the resources of the Court and of the litigants. In addition, when one of the litigants seeks to overturn a decision of a state court, the requirement of finality is "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124 (1945).

The New York Court of Appeals has not entered a "final" judgment within the meaning of 28 U.S.C. §1257. On an issue of state law the Court of Appeals remitted petitioner's case for a new trial. Petitioner thus is subject neither to a judgment of conviction nor to a sentence of fine or imprisonment. Like any other defendant indicted in a state court, petitioner faces only an obligation to defend himself from the charges contained in the indictment. If petitioner is convicted at the second trial, he will thereafter be able to present his claim to this Court after appealing

his conviction in the state courts. Of course, if petitioner is acquitted the issue here raised will be moot.

There is no good reason for this Court to hear this case before the adjudication of guilt or innocence. See *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). The problem addressed by the Court of Appeals' opinion is not so pressing that it requires this Court's immediate attention. Indeed, as far as we are aware, the opinion below is the first and only reported decision dealing with the question of whether a witness who lies in the grand jury may move to suppress his false testimony on the ground that the questions were based on illegal wiretapping. If in the future the issue raised in the Court of Appeals' decision engenders more litigation, this Court will at that time be able to deal with the issue in a case that is ripe for review.

2. The rule in *Gelbard* v. *United States,* 408 U.S. 41 (1972), upon which petitioner relies, is not at issue here. In *Gelbard,* the witnesses alleged that questions put to them in the grand jury were based on illegal eavesdropping. On this ground, they refused to answer. Civil contempt charges were immediately brought against the witnesses. This Court found the witnesses had a defense because, in the procedural posture of the case, the Court "assume[d]" that the eavesdropping was not done pursuant to court orders. 408 U.S. at 47. See also *id.,* at 61 n.22. By contrast, in petitioner's case the judge supervising the grand jury was shown the eavesdropping orders, inspected them, and found them facially valid. In these much different circumstances, a witness has no defense under *Gelbard.* See *id.,* at 70 (White, J., concurring). See also, *e.g., In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974).

More importantly, however, petitioner, unlike the witnesses in *Gelbard*, chose to testify and then lied to the grand jury. Because petitioner thereby committed an independent criminal act, the admissibility of his false grand jury testimony must be determined under the familiar principles of attenuation enunciated by this Court in many cases. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).* Those principles clearly dictate the result reached by the Court of Appeals below.

When a person commits an unlawful act independent of illegal police conduct—for example, when he shoots at or attempts to bribe an officer executing an illegal search or making an illegal arrest—that person cannot excuse his crime or have evidence of the crime suppressed even though his act was occasioned by the police conduct. See, *e.g.*, *United States* v. *Perdiz*, 256 F. Supp. 805 (S.D.N.Y. 1966); *People* v. *Townes*, 41 N.Y.2d 97, 102, 390 N.Y.S.2d

* 18 U.S.C. §2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury * * * of the United Sattes, a State, or a political subdivision thereof if the disclosure of that information would be in violation of [Title III].

Despite petitioner's contention to the contrary (Petition at 5), this section does not alter, in eavesdropping cases, the rule that an independent criminal act attenuates the taint of prior illegal conduct. Indeed, the Senate Report accompanying Title III explicitly states that by enacting section 2515, Congress had

> no intention to change the attenuation rule. See *Nardone* v. *United States*, 127 F.2d 521 (2d), certiorari denied, 316 U.S. 698 (1942); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role [sic] beyond present search and seizure law. See *Walder* v. *United States*, 347 U.S. 62 (1954). S. Rep. 1097, 90th Cong., 2d Sess. 106, U.S. Code Cong. & Admn. News, 2112, 2185 (1968).

893, 897 (1976); *People* v. *Munger*, 37 A.D.2d 950, 326 N.Y.S.2d 212 (1st Dept. 1971), *appeal dism'd*, 33 N.Y.2d 576, 347 N.Y.S.2d 449 (1973). The same principles apply to testimonial crimes, whether committed in the grand jury or elsewhere. The government may not have the right to ask certain questions or may ask questions in an illegal manner. In such cases, a witness may, in some circumstances, avoid answering, even after he has sworn to tell the truth. However, in no circumstances will a witness be permitted to lie. As Mr. Justice Harlan said for the Court in *Bryson* v. *United States*, 396 U.S. 64, 72 (1969):

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

This same rule has been followed consistently. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174 (1977); *United States* v. *Mandujano*, 425 U.S. 564 (1976); *United States* v. *Knox*, 396 U.S. 77 (1969); *Dennis* v. *United States*, 384 U.S. 855 (1966); *Kay* v. *United States*, 303 U.S. 1 (1938); *United States* v. *Kapp*, 302 U.S. 214 (1937). Petitioner has cited no case to the contrary; in fact, as far as we know, there is none.* There is no warrant for review by this Court of this familiar principle of law.

* *United States* v. *Scios*, 23 Crim. L. Rep. 2424 (D.C. Cir. 1978) (en banc), cited by petitioner, is inapposite. There, a witness against Scios had been discovered as a result of an illegal search of a file

(footnote continued on next page)

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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folder in Scios' residence. The witness later had refused to testify before a grand jury until he had been ordered to do so. The Court of Appeals found, under those circumstances, no independent conduct that would attenuate the taint of the illegal search and permit the use of the witness' testimony at Scios' upcoming trial. But of course there the prospective testimony was not, like petitioner's grand jury testimony, the product of the defendant's own criminal act independent of the illegal police conduct.